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No. 03-82

In The
Supreme Court of the United States

MARIE WOOD AND TERRY BORMAN, INDIVIDUALLY, AND AS THE NATURAL PARENTS OF MARY LORRAINE WOOD BORMAN,

Petitioners,

vs.

UNIVERSITY OF UTAH MEDICAL CENTER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

For purposes of this appeal, the University Medical Center does not dispute plaintiffs' statement of facts.

SUMMARY OF ARGUMENT

This is not a case where a doctor's actions caused a child to be born with defects. "The disorder is genetic and not the result of any injury negligently inflicted by the doctor." *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528, 536 (1985), *cert. denied*, 479 U.S. 835 (1986). "It is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's handicap is an inexorable result of conception and birth." *Id.*

Similarly, there is no allegation in this case that the doctor intentionally withheld information from the plaintiffs in order to defeat Ms. Wood's right to make an informed choice concerning abortion. The allegations of the Complaint sound only in negligence.

The issue in this case is whether the Utah Legislature acted within its constitutional prerogative in prohibiting claims for wrongful birth or wrongful life. As the Legislature explicitly recognized, there are significant adverse societal consequences to allowing claims for wrongful birth and wrongful life to go forward. The prosecution of such an action "requires that parents deny the worth of their child, thus placing their own values over those of the child." *C.S. v.*

Nielson, 767 P.2d 504, 523 (Utah 1988) (Howe, J., dissenting). Such claims stigmatize the "defective" child. They place the imprimatur of law on a claim that the child's family, and society in general, would be better off had the child not been born. They "denigrate[ ] human life" and are "an insidious attack on the family unit." *Id.*

> One cannot pass over how painful to parents and child alike an action by parents must be. Parents will show that they did not want the child in his condition and that he would have been aborted had it not been for the professional inattentiveness of a physician or other medical person. Had they known, he never would have been. It is public policy obviously to encourage love and harmony in family relationships. Public policy which importance transcends individual disputes will hardly be served by lawsuits of this character.

Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230, 512 N.E.2d 691, 709 (1987) (Ward, J., concurring and dissenting).

Thus, the Legislature was well within its power in passing the Act and prohibiting such actions. Especially where the frontiers of science and law are evolving together, as they are in this area, great deference should be accorded to the Legislature's decision, as the elected representatives of the people, to make the difficult policy judgments involved.

Plaintiffs have failed to meet their burden of overcoming the presumption of constitutionality of the Act. They have failed to show, as required by the Due Process clause of the United States Constitution, that the Act has an

unlawful purpose or places significant obstacles in the path of a woman's right to choose to have an abortion.

ARGUMENT

I. THE UTAH WRONGFUL LIFE ACT.

The Utah Legislature enacted the Utah Wrongful Life Act in 1983. The Act contains a legislative declaration of purpose, followed by a ban on claims based upon the allegation that, but for the act or omission of another, a person would not have been born:

> The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons.
>
> A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.
>
> The failure or refusal of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action.

Utah Code Ann. §§ 78-11-23 through -25.

Seven other states have enacted similar statutes. *See* Idaho Code § 5-334; Ind. Code Ann. § 34-12-1-1; Minn. Stat. § 145.424; Mo. Rev. Stat. § 188.130; N.D. Cent. Code

§ 32-03-43; 42 Pa. Cons. Stat. § 8305; S.D. Codified Laws § 21-55-1. The Minnesota and Pennsylvania statutes have been challenged as unconstitutional. Both were upheld. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986); *Dansby v. Thomas Jefferson University Hosp.*, 424 Pa. Super. 549, 623 A.2d 816 (1993).

Claims in this general area fall into three general categories. *Wrongful pregnancy* cases involve claims arising out of negligence with regard to birth control and sterilization procedures. *Wrongful birth* claims are asserted by parents who allege that an erroneous post-conception diagnosis led them to give birth to a "defective" child whom they would have aborted had the diagnosis been correct. *Wrongful life* claims are similar to wrongful birth claims, but are asserted by or on behalf of the defective child. *See C.S. v. Nielson*, 767 P.2d 504, 506 (Utah 1988) (recognizing wrongful pregnancy claim but restricting nature of recoverable damages). Wrongful life claims, in particular, are not favored. *See Kassama v. Magat*, 136 Md. App. 637, 767 A.2d 348, 365 (2001).

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS REGARDING APPLICATION OF THE "PURPOSE" PRONG OF *CASEY*.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the United States Supreme Court reaffirmed the "right of a woman to choose to have an abortion before viability and to obtain it without *undue* interference from the State." *Id.* at 846 (emphasis added). "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 874. "Not all burdens on the right to decide whether to terminate a

pregnancy will be undue." *Id.* at 876. A burden is undue where it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

> The doctrine of *Roe v. Wade* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." In order for a state to be in violation of *Roe v. Wade*, the state must directly affect or impose a significant burden on the woman's right to an abortion. Legislation which does not place a government obstacle in the path of a woman who chooses to terminate her pregnancy will not be deemed unconstitutional.

Dansby v. Thomas Jefferson University Hospital, 424 Pa. Super. 549, 623 A.2d 816, 819 (1993) (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) and citing *Harris v. McRae*, 448 U.S. 297, 315 (1980)).

Plaintiffs contend that this Court should grant the petition because of an alleged conflict among the lower courts concerning application of the "purpose" prong of *Casey*. They contend that the Utah Supreme Court erred in relying on the Legislature's expressed statement of purpose contained in the Act, and by refusing to consider statements of individuals involved in drafting the Act.

The petition does not identify the evidence of purpose upon which plaintiffs rely. That evidence does not consist of traditional legislative history, which in Utah is notoriously wanting. Rather, it consists of the statement of a law professor who participated in drafting the Act, who opined in a telephonic interview with a law student that the trend in the law at the time was toward an expansion of the duties of medical providers to perform tests, and that the

Act would minimize *routine*, *i.e.*, not otherwise medically indicated, genetic testing. He believed this would in turn reduce the number of abortions performed as a result of routine genetic testing, and that the Act would also shield providers from claims that they had a duty to perform routine genetic testing. *Utah Legislative Survey: Wrongful Life and Wrongful Birth*, 1984 Utah L. Rev. 221, 224 n.748; Note: *Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater*, 1984 Utah L. Rev. 833, 858 n.153.

The Utah Supreme Court did not break with this Court's decision in *Casey* by refusing to weigh this evidence more heavily than the express statement of purpose set forth in the Act. Rather, the court correctly reasoned:

> Plaintiffs' contention that the statute's legislative history evidences that the statute's purpose is to prevent or hinder abortions is unavailing as we need not examine the legislative history of this statute to discover the legislative intent. "When examining a statute, we look first to its plain language as the best indicator of the legislature's intent and purpose in passing the statute." Legislators may decide that a statute should be passed for myriad, often even different, reasons, but where the legislative purpose is expressly stated and agreed to as part of the legislation, we do not look to the views expressed by one or more legislators in floor debates, committee minutes, or elsewhere, in determining the intent of the statute. Because the legislature expressly set forth its intent and purpose in section 78-11-23 in enacting the instant legislation, we do not look at its legislative history. The purpose of the instant statute, as stated in section 78-11-23, is clear and unambiguous: "to encourage all

> persons to respect the right to life of all other persons, . . . including all persons with a disability and all unborn persons." § 78-11-23 (2002); *see also* § 78-11-23 (2002).

Wood v. University of Utah Medical Center, 2002 UT 134 at ¶ 19, 63 P.3d 436 (citation omitted). It should be noted that the Utah Supreme Court did take the kinds of arguments made by the law professor into consideration as part of its analysis of the constitutionality of the Act under the effect prong of *Casey*, but found them to be unpersuasive. *See Mazurek v. Armstrong*, 520 U.S. 968 (1997) (suggesting that a claim of unconstitutional purpose without proof of unconstitutional effect is unlikely to succeed).

The Utah Supreme Court's approach is consistent with a long line of precedent from this Court. For example, in *Regan v. Wald*, 468 U.S. 222 (1984), this Court held:

> Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President.

468 U.S. at 237. Similarly, in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (plurality opinion), the Court held:

> This Court has long recognized that "[i]nquiries into congressional motives or purposes are a

> hazardous matter," and the search for the "actual" or "primary" purpose of a statute is likely to be elusive. Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of "chastity," and still others about promoting various religious and moral attitudes towards premarital sex.
>
> The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. And although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, if it "could not have been a goal of the legislation," this is not such a case.

450 U.S. at 469-70 (citations omitted).

The cases cited by petitioners are consistent with that rule and with the reasoning of the Utah Supreme Court in this case. In *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), the court did not turn to such dubious sources of "legislative history" in determining that the law in question had the purpose of restricting the right to abortion. Rather, the court held that the statute itself evidenced a "deliberate decision" of the Legislature to "disregard controlling Supreme Court precedent:"

> In our view, the State's determination to define viability in a manner specifically and repeatedly condemned by the Court evinces an intent to

> prevent a woman from exercising her right to choose an abortion . . . .

102 F.3d at 1116-17.

In *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), the court, like the Tenth Circuit in *Jane L.*, held that the structure and language of the Act itself "put the lie to the State's insistence that the legislation is designed merely to enhance the information furnished to women seeking abortions." 190 F.3d at 356.

Finally, in *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999), the court merely held that the plaintiffs had produced no evidence that the stated purpose was unconstitutional or pretextual. 188 F.3d at 496.

Those cases are not inconsistent with the decision in the case at bar. In *Jane L.* and *Okpalobi*, it was facially evident that the statute had an unconstitutional purpose. In *Karlin*, like the case at bar, there was no such evidence, and the claim of unconstitutional purpose was rejected. This Court should reject the claim that a clear and unambiguous statement of legislative purpose can be undermined or even changed by the unofficial statements of participants in the legislative process.

III. THE ACT DOES NOT VIOLATE DUE PROCESS BECAUSE IT DOES NOT UNDULY BURDEN A WOMAN'S RIGHT TO CHOOSE ABORTION.

A. The Plaintiffs Have Not Established State Action.

The Fourteenth Amendment guarantee of due process only applies where the deprivation of a constitutional right is by governmental "state action." *Lugar v. Edmondson Oil*

Co., 457 U.S. 922, 941 (1982). Applying the Fourteenth Amendment, this Court held:

> Our cases have . . . insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937.

Plaintiffs cannot establish state action in this case. They claim that by extinguishing causes of action for wrongful birth and wrongful life, the Legislature encourages physicians to withhold accurate information, and that this in turn precludes women from choosing to abort their unborn children. That alleged causal link, however, is broken by the individual choices of the non-state actors involved in the decision. Plaintiffs' argument is that, by protecting the health care provider from liability for wrongful birth, the Act facilitates the provider's ability to directly mislead the woman and thus impairs her ability to make an informed choice concerning abortion. Plainly, under those hypothetical circumstances (which do not exist in this case) the provider's individual actions cause the failure of choice, and no state action is involved.

> We conclude, therefore, that the legislative decision to preclude a cause of action for wrongful birth does not place a government obstacle in the path of a woman's right to choose to abort a

> fetus which she is carrying for whatever reason. Her freedom to decide is not impaired by a statute which denies her the right to bring an action against the physician who has negligently failed to advise her correctly regarding the health of the fetus. "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."

Dansby v. Thomas Jefferson University Hosp., 424 Pa. Super. 549, 623 A.2d 816, 819 (1993) (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

The Minnesota Supreme Court declared constitutional a statute barring claims for wrongful birth in *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). The court stated, "[W]e do not believe that the due process and equal protection clauses of the Fourteenth Amendment apply in this case. Prerequisite to a possible violation of the Fourteenth Amendment is state action or involvement." *Id.* at 13 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)). The court continued:

> How can it be argued that state action is involved in this case? The relationship here is strictly between doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and the risk they entail. It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct.

Id. (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

The Act does not regulate or directly affect a woman's right to choose to have an abortion. It does not forbid

doctors from informing patients about prenatal tests, the risks they entail and the results of any tests. The Act merely precludes claims, such as this one, that but for the mistakes of doctors in performing and reporting prenatal tests, a child would have been aborted prior to birth. Such a prohibition on civil claims is not state action.

B. The Purpose of the Act is Not to Prevent Abortions.

Plaintiffs assert that the purpose of the Act is to prevent abortions by preventing a woman from becoming informed about the health of her unborn child. They assert that the Act is therefore unconstitutional under the "purpose" prong of *Casey*.

The Utah Legislature specifically set forth the purpose of the Act in § 78-11-23. Section 78-11-23 states, "The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons."

"When interpreting a statute, this Court's 'primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve.'" *Boulder Mountain Lodge, Inc. v. Town of Boulder*, 983 P.2d 570, 573 (Utah 1999). "[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citation omitted).

> The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains

> a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991).

The stated purpose of the Act is clear and unambiguous. It is to encourage people to "respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons." Utah Code Ann. § 78-11-23. The Act does not state or even imply that its purpose is to prevent abortions or to prevent a woman from becoming informed about the health of her unborn child.

The State's interest in protecting and promoting respect for the disabled is certainly a valid legislative purpose. It is not pretextual. In this situation, the Act protects a child from being labeled better dead than alive.

Various courts from other jurisdictions have articulated the importance of this interest. For example, "Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?" *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528, 533 (1985), *cert. denied*, 479 U.S. 835 (1986). "When will parents in those jurisdictions be allowed to decide that their child is so 'defective' that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable? When a fetus is only the carrier of a deleterious gene and not itself impaired? When

the fetus is of one sex rather than the other?" *Id.* at 535. "Judges and juries will have to determine the degree of impairment that renders a child's nonexistence preferable to existence. Not only will such a judgment be unpalatable, but persons making this judgment can look only to their own feelings or fears of being handicapped in deciding the merits of the claim." Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 U.C.L.A. L. Rev. 473, 499 (1981) (footnote omitted).

The State also has a legitimate, non-pretextual interest in protecting individuals afflicted with a physical or mental deformity from being stigmatized because of their condition, and particularly from having their own parents publicly assert it would have been better for the child never to have been born because of his or her condition. *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action").

Plaintiffs refer in their petition to so-called "legislative history" of the Act to bolster their claim that the Act had an unstated purpose of limiting abortion. This argument is unpersuasive on several levels. The sources cited are not legislative history. Rather, they are unsupported speculation and secondhand statements of individual participants in the legislative process, in the newspaper and in personal interviews. *See* Note, *Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater*, 1984 Utah L. Rev. 833, 857-58 nn.152-153. Even if such sources were credible, they are an inappropriate source of legislative history in this case. Members of the Legislature voted on the statement of purpose set forth in the Act, not on floor statements or

media statements of individual legislators or others. Where the express statement of purpose is in the Act, is clear, and was voted on, it must be accepted over the clamor of individual politicians attempting to obtain political advantage from their votes.

C. The Act Does Not Have the Effect of Preventing a Woman From Obtaining an Abortion.

Plaintiffs argue the Act has the effect of substantially obstructing a woman from exercising an informed decision to terminate her pregnancy by leaving doctors free to mislead women concerning their choices, in violation of the "effect" prong of *Casey*. That argument is incorrect, because there are other substantial penalties for doctors who engage in such conduct. Doctors are still subject to penalties for misrepresenting a patient's condition to the patient. The Division of Occupational and Professional Licensing may "revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee . . . [if] the . . . licensee has engaged in unprofessional conduct." Utah Code Ann. § 58-1-401(2). The Division may also assess administrative penalties of up to $10,000 for unprofessional conduct. Utah Code Ann. § 58-67-503(2) (citing § 58-67-402(1)). "'Unprofessional conduct' means . . . violating . . . any generally accepted professional or ethical standard applicable to an occupation or profession regulated under this title." Utah Code Ann. § 58-1-501(2)(b). It is a violation of a doctor's professional and ethical duties to make intentional misrepresentations in connection with patient care.

The Pennsylvania Superior Court rejected the "substantial obstacle" argument in *Edmonds v. Western Pennsylvania Hospital Radiology Associates of Western Pennsylvania*, 414 Pa. Super. 567, 607 A.2d 1083 (1992). In *Edmonds*, the plaintiffs challenged the constitutionality of a Pennsylvania statute prohibiting claims for wrongful birth. The *Edmonds* court ruled the statute did "not encourage either intentional misrepresentations or the negligent impartation of information relating to abortion rights" and, therefore, did not amount to state action. *Id.* at 1087. The court stated the statute did not regulate or directly affect a woman's right to choose to have an abortion but merely extinguished causes of action arising from a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth. *Id.* Because physicians could be disciplined or their licenses revoked or suspended if they intentionally misrepresented to a woman the state of her health or that of her unborn child in an effort to infringe upon her abortion rights, the court ruled the statute did not encourage physicians to lie to their patients. *Id.* The court continued, "[W]e would be engaging in speculation were we to assume that this extinguishment of liability encourages such improper [negligent] behavior." *Id.* at 1088. The court went on to rule the statute was constitutional.

The Utah Legislature has by statute allowed physicians to be fined and their licenses revoked or suspended if they intentionally misrepresent the state of a woman's health or that of her unborn child to prevent her from having an abortion. These statutes impose severe consequences upon them for doing so, and thus provide sufficient protection to ensure to the best of the State's ability that doctors adequately inform their patients of the status

of their medical condition. The statutory consequences are potentially more severe than the consequences of civil litigation, prohibiting the doctor from ever practicing medicine in Utah again. Moreover, they would not be covered by malpractice insurance and would have more lasting effects than a monetary settlement.

The Act's bar on wrongful birth claims does not constitute an undue burden on a woman's right to choose to have an abortion. Consequently, the Act is constitutional.

CONCLUSION

For the foregoing reasons, the University respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted September 8, 2003.

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